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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 509

MALCOLM B. DEVERS,

Petitioner.

v.

CAPITAL INVESTORS CO., MARIAN A. MORRISON, ARTHUR R. MORRISON,

Respondents,

PETITION FOR REHEARING

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CAPITAL INVESTORS CO., MARIAN A. MORRISON, ARTHUR R. MORRISON,

Respondents,

Petitioner presents his petition for a rehearing of this Court's order dated November 7, 1966, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner submits that the establishment of a parol trust on land in Virginia by the trial Court below prejudiced petitioner's rights and interest in this cause since the determination by the trial Court below failed to

follow the guide lines established by the Supreme Court of Virginia in cases of like nature. Petitioner submits that the solemnity and import of valid deeds of bargain and sale vesting full title and the fee in the real estate concerned herein in petitioner should not be disturbed. Since there is no federal law respecting the establishment of a parol trust in the case at bar, the trial Court below was required to follow the principles and guide lines established by the Supreme Court of Virginia in cases of like nature, which, however, the trial Court below arbitrarily failed and refused to do in the premises, resulting in a deprivation of petitioner's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Petitioner further submits that the trial Court below arbitrarily failed and refused to conform to the law applicable in the case at bar and would not recognize the precedents of law in the State of Virginia applicable to the case in controversy concerning title to the land in question herein. Impressing a parol trust on the land concerned herein by the Courts below was not only a flagrant disregard of the evidence revealed by the record in this case, but, further, was an arbitrary determintation of the issues of such dimension as to violate petitioner's fundamental rights under the due process clause of the Fifth Amendment to the Constitution of the United States.

A reasonably careful review of the record in this case cannot help but reveal that the judgment and decree of the trial court affirmed by the United States Court of Appeals for the Fourth Circuit honored champertous conduct on the part of James T. Benn, president and sole owner of the respondent corporation, Capital Investors Company, and gave validity to a contract between it and the respondent, Marian A. Morrison, which was patently and obviously champertous and as such was illegal and void, and conveyances pursuant thereto should have been declared without legal effect.

It is remarkable that one of the respondents, Arthur R. Morrison, joined the petitioner Devers herein in seeking to convince this Honorable Court to grant said petitioner Devers' petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit on one important point raised by petitioner. The respondent, Arthur R. Morrison, not only agreed with petitioner that said respondent corporation, Capital Investors Company, by and through its sole owner, James T. Benn, received judicial approval in the Courts below of an invalid, illegal and void contract, but that the record in this case clearly and unequivocally supports the irrefutable facts that the agreement between respondent, Capital Investors Company, and respondent, Marian A. Morrison, was champertous, and as such we respectfully submit should have been struck down and held to be invalid, illegal and void.

POINT I

Petitioner submits that in the absence of Federal law respecting the establishment of a parol trust, the Courts below were required to follow established principles of law obtaining in the State of Virginia. The decisions in the State of Virginia have clearly held that a parol trust may be impressed, if at all, upon solemn deeds or testaments, only with the greatest of restraint. That in line with the judicial mandate of the highest Court of the State of Virginia, we submit that unless fraud is clearly established, a parol trust will never be impressed on a solemn deed or testament; and we submit further that in the case at bar the Courts below had no valid or legal justification for impressing a parol trust upon the valid deeds of bargain and sale received by Devers, grantee, from the respondents, Arthur R. Morrison and Marian A. Morrison, his grantors. In one of the earliest cases heard by the Virginia Supreme Court, the Court there said, in *Springle v. Haworth*, 26 Grat 384, 67 Va. 384 (1875):

> "In the absence of fraud on the part of a legatee, a court of equity will not enforce a parol charge upon his legacy."

See *Hook v. Hook*, 126 Va. 249, 101 S.E. 223 (1919), and *Ingles v. Grear*, 181 Va. 838, 27 S.E.2d 222. Again the Supreme Court of Virginia stated in the case of *Shields v. E. S. Adkins & Co.*, 117 Va. 616, 85 S.E. 492 (1915):

> "While an express trust with respect to real estate or an interest therein may be created by parol and is enforceable in a court of equity, the application to the Court for the enforcement of the trust must set forth a contract that is clear, definite and unequivocal in all its terms, since it is elementary that there can be no contract unless the minds of the parties have met and mutually agreed and specific performance will not be decreed where this requisite is lacking."

Also see *Creecy v. Grief*, 108 Va. 320, 61 S.E. 769; *Powers v. Long*, 118 Va. 203, 86 S.E. 831, and *Fleenor v. Hensley*, 121 Va. 367, 93 S.E. 582, and *Garrett v. Rutherford*, 108 Va. 478, 62 S.E. 389 (1908).

Accordingly the deeds of bargain and sale conveying the real estate in question to Devers should have been honored and permitted to remain in full force and effect; and the lower Courts should have permitted title to the land in question to remain in the petitioner Devers.

POINT II

Petitioner submits that the trial Court's arbitrary action in failing and refusing to conform to the law applicable in the case at bar, concerning title to the land in question, was compounded by the opinion of the United States Court of Appeals for the Fourth Circuit, which failed and refused to place title to the land in question in the petitioner Devers. Petitioner submits that such arbitrary determination by the trial court below was of such dimension as to violate his fundamental rights under the due process clause of the Fifth Amendment to the

Constitution of the United States. See the case of *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, where this principle of conformity was decisively stated. Petitioner submits that this Honorable Court should direct the lower Courts herein, which deprived him of title to his property, to be compelled to conform as near as possible to the precedents and law of the State of Virginia applicable in this case in controversy.

POINT III

Petitioner submits that the lower Court, by virtue of the record, should have unhesitatingly found the conduct of James T. Benn, sole owner of the stock in the respondent, Capital Investors Company, to have been champertous; and the lower court should have declared invalid and void, the agreement between the respondents, Capital Investors Company and Marian A. Morrison. The record in this case clearly and unequivocally supports the claim and position of petitioner herein that the Courts below gave legal sanction to a champertous agreement, which resulted in depriving petitioner of his real property and adversely affected his legitimate right, title and interest therein. This should not have occurred, and the record of this case eloquently speaks, that the courts below should not have permitted this to be done in this case.

This Court has held champertous contracts to be unlawful and that such contracts pass no title in land affected thereby. See *Peck v. Heurich*, 167 U.S. 624, 17 S. Ct. 927, 42 L. Ed. 302.

The courts of Virginia regard champertous contracts as illegal and void, and conveyances pursuant to such contracts as without legal effect. See *Seward v. Camp Mfg. Co.*, 112 Va. 379, 71 S.E. 614, *Roller v. Murray*, 107 Va. 527, 59 S.E. 421; *Ventro v. Clinchfield Coal Corp.*, 199 Va. 943, 103 S.E. 2d 254.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58, Subdivisions 1. and 2. of the Rules of this Court.

JOSIAH LYMAN
Attorneys for Petitioner